

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES H. JOHNSON : CIVIL ACTION
 :
 v. :
 :
 DONALD VAUGHN, et al. : NO. 97-230

MEMORANDUM and ORDER

Norma L. Shapiro, J.

January 14, 1998

Petitioner James H. Johnson ("Johnson") has filed a pro se petition for writ of habeas corpus under 28 U.S.C. § 2254. For the reasons stated below, his petition will be denied.

FACTS

Johnson's first trial in the Philadelphia County Court of Common Pleas ended in a mistrial after a police officer testified about an inculpatory statement made by Johnson that had not been provided to defense counsel. The trial court determined the prosecutor's failure to inform the defense of the statement was inadvertent and ordered a retrial. See Court of Common Pleas Post-Trial Opinion at 8-10. Johnson's second trial resulted in his conviction for first degree murder, possession of an instrument of crime and abuse of a corpse. The jury determined Johnson murdered Helen Jackson ("Jackson") in 1993. She was stabbed thirty-three times with a knife and beaten with a flashlight; her body was wrapped in a blanket and stuffed under Johnson's porch. The jury recommended life imprisonment.

After Johnson's post-verdict motions were denied, he was

sentenced to life imprisonment on the murder conviction and a consecutive term of thirty to sixty months on the conviction for possession of an instrument of crime.

Johnson filed an appeal to the Superior Court of Pennsylvania on the following grounds: 1) his confession was not taken within six hours of his arrest, in violation of Pennsylvania's prompt arraignment rule; 2) Officer Scott, a prosecution witness, was later arrested and charged with falsifying reports in an unrelated case; 3) his retrial was barred on double jeopardy grounds; 4) the Philadelphia District Attorney's Office should have been replaced by the Pennsylvania Attorney General's Office; 5) his intoxication at the time of the crime prevented formation of the specific intent to kill; and 6) the jury charge on voluntary intoxication, malice and the use of a deadly weapon on vital parts of the body was erroneous.

The Superior Court affirmed the judgment by opinion filed on June 18, 1996. Johnson sought review on these same six claims in the Pennsylvania Supreme Court; that court denied review on December 10, 1996. Johnson did not pursue state post-conviction remedies.

Johnson filed his first federal habeas petition on January 10, 1997, on the following eight grounds: 1) his forged confession, taken more than six hours after his arrest; 2) Detective Duffy's perjured testimony that his confession was made

within six hours of his arrest; 3) ineffective assistance of counsel because his lawyers "double-crossed" him and "refused to present any defense but to third degree murder"; 4) the trial transcript, altered and revised as part of a massive conspiracy involving state officials and his lawyers, adversely affected appellate review; 5) the Commonwealth's failure to disclose evidence favorable to his defense; 6) his retrial was barred as double jeopardy; 7) the Pennsylvania Attorney General's Office should have replaced the Philadelphia District Attorney's Office; and 8) the physical evidence used against him (e.g., the hunting knife used to stab the victim thirty-three times, criminal laboratory report, and clothing and blood evidence) was fraudulent, inadmissible or fabricated.

Johnson's petition was referred to United States Magistrate Judge Arnold C. Rapoport ("Judge Rapoport") for a Report and Recommendation. Judge Rapoport recommended Johnson's petition be dismissed as a mixed petition, because five of the eight claims had not been exhausted in state court. By Order dated May 28, 1997, this court approved and adopted Judge Rapoport's Report and Recommendation but allowed Johnson to submit an amended petition including only exhausted claims.

Johnson wrote the court that his non-exhausted claim that the trial transcript had been altered would impact some of his exhausted claims. This court held a hearing and colloquy with

the petitioner on August 19, 1997. The court informed Johnson that if he chose to pursue exhausted claims instead of withdrawing his entire petition until all claims had been exhausted, the court would not consider any non-exhausted matters. Johnson was cautioned that if only his exhausted claims were adjudicated, he might be unable to file a later, successive federal habeas petition after his presently unexhausted claims had been presented to the state courts for review. Johnson informed the court he understood but still wanted the court to decide only the exhausted claims forthwith.

Johnson then submitted an amended petition for writ of habeas corpus on these grounds: 1) his confession was not taken within six hours as required by Pennsylvania's prompt arraignment rule; 2) Officer Scott, a prosecution witness, subsequently was arrested and charged with falsifying reports in an unrelated case; 3) retrial was barred as double jeopardy; 4) the Philadelphia District Attorney's Office should have been replaced by the Pennsylvania Attorney General's Office; 5) the evidence was insufficient to support a conviction for first degree murder because he was too intoxicated at the time of the crime to form the necessary intent; and 6) the jury charge on voluntary intoxication, malice and the use of a deadly weapon on vital parts of the body was erroneous.

Johnson presented these claims in his direct appeal to the

Pennsylvania Superior Court and sought review by the Supreme Court of Pennsylvania. Johnson has satisfied the exhaustion requirement for federal habeas corpus review of these six claims.

DISCUSSION

Judge Rapoport determined the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), enacted April 24, 1996, apply. Johnson filed his first habeas petition on January 10, 1997 and his amended petition on May 16, 1997. Johnson, citing Lindh v. Murphy, 117 S. Ct. 2059 (1997), objects to application of the AEDPA to his habeas petition because his conviction and sentencing occurred in April, 1994. The Supreme Court held in Lindh that provisions of the AEDPA did not apply to habeas petitions pending on the date of enactment. See id. at 2063. Johnson filed his habeas petitions in 1997, after enactment of the AEDPA.

The only relevant changes effectuated by the AEDPA strengthened the presumption of correctness afforded to state factual findings. Under the AEDPA, factual findings are presumed correct and the petitioner has the burden of rebutting the presumption by clear and convincing evidence. See 28 U.S.C. § 2254(e)(1). Prior to the AEDPA, state factual findings also were presumed correct. See 28 U.S.C. § 2254(d) (1994). But Johnson's claims raise mainly questions of law not questions of fact; reexamining the factual findings here would be barred under the

preexisting provisions of § 2254 as well as the AEDPA.

Johnson's first claim is that his confession should have been suppressed because it was taken more than six hours after his arrest in violation of Pennsylvania's prompt arraignment rule. See Commonwealth v. Davenport, 370 A.2d 301, 306 (Pa. 1977). Judge Rapoport concluded this state law claim did not justify granting a federal habeas petition. Johnson, arguing the prompt arraignment rule "serves to protect the accused's" rights, objected. See Pet.'s Objection at 4.

Section 2254 provides relief only for petitioners in custody "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a);¹ see Estelle v. McGuire, 502 U.S. 62, 68 (1991); Pulley v. Harris, 465 U.S. 37, 41 (1984). Pennsylvania's prompt arraignment rule is based on the Pennsylvania Constitution; it is a state law, regardless of any beneficial effect it may have on federal constitutional rights. Johnson cannot prevail on a federal habeas petition for violation of the Pennsylvania prompt arraignment rule.

Under the federal Constitution, arraignments occurring within twenty-four hours of arrest (and the use of any confessions made within that period) are not unconstitutional. See Stroble v. California, 343 U.S. 181, 196-97 (1952). There is no dispute that Johnson was arraigned within twenty-four hours;

¹ Section 2254(a) was not altered by the AEDPA.

Johnson has no claim under federal law based on delay in arraignment.

Johnson bases his second claim on the subsequent arrest and charge of prosecution witness Officer Scott with falsifying reports in an unrelated case. Judge Rapoport determined state law governs whether Johnson was entitled to a new trial based on the after-acquired evidence of Officer Scott's falsification. Johnson objected to Judge Rapoport's recommendation to deny this claim based on state law.

Pennsylvania law establishes a multi-step test for determining whether a new trial is warranted based on after-acquired evidence. See Commonwealth v. Williams, 640 A.2d 1251, 1263 (Pa. 1994); Commonwealth v. Mosteller, 284 A.2d 786, 787 (Pa. 1971). If the state courts incorrectly denied a new trial under state law only, that incorrect application of state law is not an adequate basis for granting a federal habeas petition. See 28 U.S.C. § 2254(a).

Johnson argues Officer Scott never even testified at his trial; the court reporter allegedly falsified the trial transcripts by inserting Officer Scott's testimony as part of a larger conspiracy.² See Pet.'s Opposition at 16. This could raise a federal due process violation, but Johnson has not yet

² If Officer Scott never testified, then the subsequent crimen falsi against him would be irrelevant.

raised this claim in state court; as the court informed Johnson in August, 1997, this issue cannot be considered until it has been presented to the state courts. See 28 U.S.C. § 2254(b)(1)(A).³

Johnson's third claim is that the trial court should have barred his second trial as placing him in double jeopardy. Johnson raised this claim in his Petition for Allowance of Appeal to the Pennsylvania Supreme Court. Johnson based this claim on the double jeopardy provision of the Pennsylvania Constitution and state court cases interpreting it. A violation of state law does not justify grant of a federal habeas petition. See U.S.C. § 2254(a).

Johnson did not present the state courts with a claim of violation of the federal Double Jeopardy Clause. Johnson could have raised the federal Double Jeopardy claim on direct appeal and failed to do so, so the Pennsylvania Post Conviction Relief Act ("PCRA") precludes him from doing so in a state post-conviction proceeding. See 42 Pa. Cons. Stat. Ann. § 9544(b).

"If the petitioner failed to exhaust state remedies and the court to which petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred ... there is a procedural default for

³ Exhaustion of state remedies was required prior to the AEDPA's enactment. See 28 U.S.C. § 2254(b)(1994). Johnson continues to submit letters and affidavits alleging that the trial transcript has been falsified. The court cannot consider these claims at the present time.

purposes of federal habeas regardless of the decision of the last state court to which the petitioner actually presented his claims." Coleman v. Thompson, 501 U.S. 722, 735 n.1 (1991).

Johnson's procedural default under an independent and adequate state law requires that he show cause for his default and prejudice or that failure to consider this claim will result in a fundamental miscarriage of justice. See Coleman, 501 U.S. at 750; Harris v. Reed, 489 U.S. 255, 260-61 (1989); Doctor v. Walters, 96 F.3d 675, 683 (3d Cir. 1996).

"[C]ause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded [his] effort's to comply with the state's procedural rule." Murray v. Carrier, 477 U.S. 478, 488 (1986). The prisoner bears the burden of establishing cause and prejudice. See Coleman, 501 U.S. at 749-50.

The cause for Johnson's procedural default is his failure to present the federal double jeopardy claim on direct appeal or in a state post-conviction proceeding. An "ignorant or inadvertent" failure to raise a claim is not sufficient to establish justifiable cause for the procedural default. Id. at 752.

Even if there is justifiable cause for the procedural default, it may be excused if there would otherwise be a fundamental miscarriage of justice. Double jeopardy could, in some instances, rise to a fundamental miscarriage of justice.

However, the fundamental miscarriage of justice rule only applies when the court believes the petitioner is "actually innocent." See Schlup v. Delo, 513 U.S. 298, 320 (1995); Murray v. Carrier, 477 U.S. 478, 495-96 (1986). Johnson's conviction, based on substantial evidence of record, including his own confession, does not permit the court to conclude he was actually innocent nor does Johnson argue his actual innocence on this record. He argues the evidence used against him was fabricated, but that claim has not yet been exhausted in the state courts. Such claim could constitute a fundamental miscarriage of justice if determined to be sufficiently egregious after an evidentiary hearing.

In limited situations a federal court may decide the merits of a habeas claim even without exhaustion in the state courts. See 28 U.S.C. § 2254(b)(2); see also Smith v. Horn, 120 F.3d 400, 407 (3d Cir. 1997) (citing Granberry v. Greer, 481 U.S. 129, 131 (1987)).⁴ A federal court is permitted to reach the merits of the unexhausted claim only if doing so will further judicial efficiency. See Granberry, 481 U.S. at 135. But see Lambert v. Blackwell, Nos. 97-1281, 97-1283 & 97-1287, slip op. at 17-21 (3d Cir. Dec. 29, 1997) (A federal court may not grant habeas relief without exhaustion unless recourse in state courts would be

⁴ This limited authority to decide the merits of an unexhausted habeas claim predates the AEDPA.

"futile.").

The federal Double Jeopardy Clause does not ordinarily preclude a second trial after a mistrial. Mere negligence on the part of the government in causing a mistrial does not preclude a second trial. See United States v. DiSilvio, 520 F.2d 247, 250 (3d Cir.), cert. denied, 423 U.S. 1015 (1975). "Where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial errors." United States v. Jorn, 400 U.S. 470, 485 (1970).

The Double Jeopardy Clause bars retrial where the prosecution intended to provoke a mistrial request by the defendant in order to subject the defendant to multiple prosecutions. See United States v. Dinity, 424 U.S. 600, 607 (1976). The prosecution must have intended to subvert the entire judicial process. See Oregon v. Kennedy, 456 U.S. 667, 673-74 (1982). The state court determined the prosecution's failure to turn over the evidence was "inadvertent." See Court of Common Pleas Post-Trial Opinion at 8-10. The prosecution was precluded from using Johnson's statement in the second trial, so it gained nothing by the mistrial. Johnson has not presented evidence to support a violation of the federal Double Jeopardy Clause; the

court will deny this claim on the merits.

Johnson's fourth claim for habeas relief is premised on the alleged error of the trial court in not replacing the Philadelphia District Attorney's Office with the Pennsylvania Attorney General's Office because of conflict of interest. See Commonwealth v. Breighner, 684 A.2d 143, 148 (Pa. Super. 1996). Johnson, citing Commonwealth v. Scarfo, 611 A.2d 242 (Pa. Super. 1992), appeal denied, 631 A.2d 1006 (Pa. 1993) in his petition for appeal to the Supreme Court of Pennsylvania, argued the prosecution improperly intruded into the defense camp during his trial and tainted his defense.

Johnson's counsel, attempting to prove prosecutorial misconduct related to petitioner's double jeopardy claim, circulated a questionnaire to attorneys with the Defenders' Association asking them whether they had had any cases involving prosecutorial discovery violations. One attorney reported a violation in another case. Someone claiming to be associated with the Defenders' Association, but not involved in this case, then called Johnson's prosecutor to ask about the questionnaire. Johnson alleged that this leak prejudiced his defense and prosecution of his case should have been transferred to the Pennsylvania Attorney General's Office from the Philadelphia District Attorney's Office because of a potential conflict of interest.

The trial court determined a single telephone call concerning a questionnaire was not a governmental intrusion into the defense camp that prevented Johnson from receiving a fair trial. See Court of Common Pleas Post-Trial Opinion at 10-11. The Superior Court of Pennsylvania, adopting the trial judge's findings, affirmed, and the Supreme Court of Pennsylvania denied review.

The state courts' determination that the single telephone call did not create a conflict requiring the trial court to remove the District Attorney's Office is presumed to be correct, whether based on state or federal constitutional law. Johnson's only argument is based on Scarfo, where the court found "a very real likelihood of prejudice was created by the presumed intrusion into the defense camp." Scarfo, 611 A.2d at 267. One defendant, who had strategized with his co-defendants and participated in the voir dire process, simultaneously engaged in several weeks of negotiations with the prosecutor, abruptly changed his plea and became a witness for the government shortly before the Commonwealth began presenting evidence. See id. at 267 n.25. Johnson has presented no governmental intrusion approaching that in Scarfo; petitioner's fourth claim for habeas relief will be denied.

Johnson bases his fifth claim for habeas relief on the sufficiency of the evidence supporting his conviction for first

degree murder. The state courts' factual determinations are presumed correct and Johnson bears the burden of rebutting that presumption. See 28 U.S.C. § 2254(e)(1).⁵ The purpose of habeas review is not for the court "to ask itself if it believes that the evidence at trial established guilt beyond a reasonable doubt.'" Sullivan, 723 F.2d at 1084 n.3 (citation omitted); see Moore v. Deputy Commissioner(s) of SCI-Huntington, 946 F.2d 236, 243 (3d Cir. 1991), cert. denied, 503 U.S. 949 (1992). "The relevant question is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" Sullivan v. Cuyler, 723 F.2d 1077, 1083-84 (3d Cir. 1983) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)); see Orban v. Vaughn, 123 F.3d 727, 731 (3d Cir. 1997).

Johnson argues he was so "high" on cocaine at the time of the repeated stabbing of the victim that he could not have formed the requisite intent to kill required for a first degree conviction. He argues he should be re-sentenced for third degree murder.

Under Pennsylvania law, a defendant may introduce evidence of his own voluntary intoxication or drugged condition only "to reduce murder from a higher degree to a lower degree of murder."

⁵ A presumption of correctness existed under the pre-AEDPA provisions of § 2254. See 28 U.S.C. § 2254(d) (1994).

18 Pa. Cons. Stat. Ann. § 308. The trial court charged the jury on voluntary drugged condition as a defense to first degree murder. The jury did not credit Johnson's defense of voluntary drugged condition and found him guilty. Both the trial court and the Superior Court found the evidence sufficient. "[F]ederal courts in habeas corpus proceedings ... look to the evidence the state considers adequate to meet the elements of a crime governed by state law." Jackson v. Byrd, 105 F.3d 145, 149 (3d Cir.), cert. denied, 117 S. Ct. 2442 (1997).

Pennsylvania defines first degree murder as a "criminal homicide"⁶ "committed by an intentional killing." 18 Pa. Cons. Stat. Ann. § 2502(a). Several police officers testified that Johnson turned himself in at the police station and told them he had killed Jackson and placed her body underneath his porch;⁷ he told them the location of the knife. Johnson also told the officers he had taken three "caps" of drugs that morning, but understood what he was saying. Johnson testified at trial and denied making a statement to the police.

⁶ A "criminal homicide" occurs when an individual "intentionally, knowingly, recklessly or negligently causes the death of another human being." 18 Pa. Cons. Stat. Ann. § 2501(a).

⁷ Johnson alleges several officers whose testimony is contained in the trial transcript never actually testified at trial. He has not presented these claims to the state courts; the court cannot grant relief based on these unexhausted claims. See 28 U.S.C. § 2254(b)(1); 28 U.S.C. § 2254(b)(1994).

"[A]fter reviewing the evidence in the light most favorable to the prosecution, [a] rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson, 443 U.S. at 319. The jury rationally could have discredited Johnson's testimony that he did not confess to killing Jackson and was too "high" on drugs to have formed the requisite intent. The court will not grant habeas relief on this claim.

Johnson's sixth claim for habeas relief is that the trial court erred in charging the jury on: voluntary intoxication or drug use; malice; and use of a deadly weapon on vital parts of the body. The trial court instructed the jury on voluntary intoxication or drug use as a defense to first degree murder; there was no error in that charge. The jury found the evidence did not support a finding that Johnson's drug use precluded him from forming the necessary intent.

The trial judge instructed the jury that malice is required to sustain a conviction of first degree murder and malice can be inferred from the use of a deadly weapon on a vital part of the body. See Commonwealth v. Martinez, 446 A.2d 899, 901 (Pa. 1982); Commonwealth v. Roberts, 437 A.2d 948, 951-52 (1981); Commonwealth v. Clark, 411 A.2d 800, 801 (Pa. Super. 1979), cert. denied, 446 U.S. 944 (1980). The evidence at trial showed Johnson stabbed Jackson thirty-three times. The jury rationally

could have concluded some or all the thirty-three stab wounds affected a vital organ of the body and justified an inference of malice.

Johnson raised these claims in state court as violations of state evidentiary rules, not federal rights. "If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court." Duncan v. Henry, 513 U.S. 364, 365 (1995). If the petitioner did not raise these claims as a violation of federal due process, but only as a violation of state evidentiary law, then he has not yet exhausted state remedies. See id. at 366. Failure to exhaust state remedies precludes federal review of these claims as alleged federal due process violations. See 28 U.S.C. § 2254(b)(1); 28 U.S.C. § 2254(b)(1994).

Johnson has requested counsel. There is no need for an evidentiary hearing at this time, so appointment of counsel is neither necessary nor appropriate. The court will deny Johnson's request for counsel without prejudice to such request in any subsequent petition.

An appropriate Order follows.

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ORDER

And now, this 14th day of January, 1998, upon de novo review of the record, the Report and Recommendation of United States Magistrate Judge Arnold C. Rapoport ("Judge Rapoport") and petitioner James H. Johnson's ("Johnson") objections thereto, and in accordance with the attached Memorandum, it is hereby **ORDERED** that:

1. The Recommendation submitted by Judge Rapoport is **APPROVED AND ADOPTED**; Johnson's objections thereto are **REJECTED**.

2. Johnson's amended petition for federal habeas corpus relief under 28 U.S.C. § 2254 is **DENIED AND DISMISSED WITHOUT AN EVIDENTIARY HEARING**.

3. Johnson's motion for appointment of counsel (Docket #15) is **DENIED**.

4. Johnson's motion that the "great writ ought to issue forthwith" (Docket #18) is **DENIED**.

5. Johnson's motion to stay state court proceedings (Docket #25) is **DENIED**.

6. Johnson's motion for relief (Docket #38) is **DENIED**.

7. Johnson's motion for sanctions (Docket #38) is **DENIED**.

8. Johnson's motion for pre-hearing discovery (Docket #43) is **DENIED**.

9. There is no probable cause to issue a certificate of appealability.

Norma L. Shapiro, J.